

Message Text

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TO AMEMBASSY ANKARA

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S E C R E T STATE 137644

E.O. 11652: GDS

TAGS: MARR, TU

SUBJ: AIR TECH IA - CLAIMS ISSUE

REF: ANKARA 4392

1. EMBASSY'S RESISTANCE TO TURKISH THIRD PARTY CLAIMS
PROPOSAL DESCRIBED IN REFTEL HAS OUR FULL CONCURRENCE.
THE PROCEDURES REQUIRED BY NATO SOFA ARTICLE VIII FOR THE
HANDLING OF THIRD PARTY CLAIMS HAVE BEEN REAFFIRMED FOR
USE IN TURKEY IN ARTICLE XI OF THE DCA, WHICH PROVIDES THAT
THE GOT AND USG "SHALL SETTLE ALL CLAIMS WHICH ARISE OUT
OF THE ACTS OR OMISSIONS OF MEMBERS OF THEIR RESPECTIVE
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FORCES AND CIVILIAN COMPONENTS OR WHICH ARISE OUT OF THEIR
RESPECTIVE ACTIVITIES PURSUANT TO THIS AGREEMENT IN
ACCORDANCE WITH ARTICLE VIII OF NATO SOFA." PARAGRAPH 4
OF ARTICLE XXII OF THE DCA SPECIFICALLY PROVIDES THAT THE

IMPLEMENTING AGREEMENTS WILL BE "IN CONFORMITY WITH THE PROVISIONS OF THIS AGREEMENT." THUS, THE TURKISH PROPOSAL IS NOT ONLY INCONSISTENT WITH NATO SOFA, AND THE PRACTICE WITHIN NATO GENERALLY, BUT IS CONTRARY TO SPECIFIC PROVISIONS OF THE DCA. FOLLOWING ADDITIONAL RATIONALE IS PROVIDED FOR YOUR USE IN EXPLAINING USG INABILITY TO ACCEPT GOT PROPOSAL.

2. THIRD PARTY CLAIMS ARE COVERED BY PARAGRAPHS 5 AND 6 OF ARTICLE VIII, NATO SOFA. PARAGRAPH 5 COVERS TORT CLAIMS BY THIRD PARTIES "ARISING OUT OF ACTS OR OMISSIONS OF MEMBERS OF A FORCE OR CIVILIAN COMPONENT DONE IN THE PERFORMANCE OF OFFICIAL DUTY, OR OUT OF ANY OTHER ACT, OMISSION OR OCCURRENCE FOR WHICH A FORCE OR CIVILIAN COMPONENT IS LEGALLY RESPONSIBLE." PARAGRAPH 6 DEALS WITH CLAIMS AGAINST MEMBERS OF A FORCE OR CIVILIAN COMPONENT ARISING OUT OF TORTIOUS ACTS OR OMISSIONS IN THE RECEIVING STATE NOT DONE IN THE PERFORMANCE OF OFFICIAL DUTY. USG CONSIDERS THAT ALL US MILITARY PERSONNEL IN TURKEY ARE COVERED BY THE SOFA, INCLUDING ARTICLE VII AND VIII, UNLESS SPECIFIC OTHER ARRANGEMENTS ARE MADE, AS IN CASE OF ATTACHE AND MAAG PERSONNEL. THIS POSITION IS CONSISTENT WITH THE PREAMBLE OF NATO SOFA WHICH STATES THAT THE PURPOSE OF NATO SOFA IS "TO DEFINE THE STATUS OF SUCH FORCES WHILE IN THE TERRITORY OF ANOTHER PARTY," AND WITH PARAGRAPH 1(A), ARTICLE I OF NATO SOFA WHICH DEFINES A FORCE AS BEING THE MILITARY PERSONNEL OF ONE CONTRACTING PARTY WHEN IN THE TERRITORY OF ANOTHER CONTRACTING PARTY "IN CONNECTION WITH THEIR OFFICIAL DUTIES." FYI: PRINCIPLE IS VERY IMPORTANT TO USG THAT ALL US FORCES IN TURKEY ARE MEMBERS OF FORCE FOR PURPOSE OF ARTICLE VII CRIMINAL JURISDICTION PROVISIONS. USG HAS CONSISTENTLY AND SUCCESSFULLY RESISTED EFFORTS BY OTHER NATO GOVERNMENTS TO DENY SOFA PROTECTIONS TO US FORCES PERSONNEL PRESENT WITHIN THE COUNTRY IN CONNECTION WITH THEIR OFFICIAL DUTIES, EXCEPT IN THE CASE OF ATTACHE AND MAAG PERSONNEL WHO MAY BE ENTITLED BY CUSTOM OR AGREEMENT TO SECRET

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BETTER STATUS. AGREEMENT THAT A PARTICULAR GROUP OR OPERATION IS NOT NATO RELATED IS THEREFORE NOT POSSIBLE FOR US UNLESS GOT IS PREPARED TO EXTEND DIPLOMATIC IMMUNITY OR OTHER PROTECTION EQUAL OR BETTER THAN ARTICLE VII TO PERSONNEL IN QUESTION. EVEN SO, THERE IS SCANT PRECEDENT FOR AGREEMENT BY USG THAT PARTICULAR OPERATIONS WITHIN NATO COUNTRY ARE OUTSIDE PURVIEW OF NATO CLAIMS PROVISIONS. END FYI.

3. THE ONLY REFERENCE IN ARTICLE VIII OF NATO SOFA TO DUTIES IN CONNECTION WITH THE NORTH ATLANTIC TREATY IS FOUND IN PARAGRAPH 1, WHICH DOES NOT DEAL WITH THIRD PARTY CLAIMS BUT RATHER DEFINES THE CLAIMS BETWEEN CONTRACTING

PARTIES FOR DAMAGE TO MILITARY PROPERTY WHICH ARE WAIVED.

THUS, THE PURPOSE OF PARAGRAPH 1 IS NOT TO DEFINE CLAIMS PAYABLE BUT TO DEFINE CLAIMS BETWEEN GOVERNMENTS WHICH ARE WAIVED. MOREOVER, WE VIEW THE REFERENCE IN PARAGRAPH 1 TO THE OPERATION OF THE NORTH ATLANTIC TREATY AS A MEANS OF LIMITING THE WAIVER OF CLAIMS BETWEEN GOVERNMENTS TO THOSE THAT ARE IN SOME WAY RELATED TO NATO, SUCH AS ANY SUCH CLAIM ARISING OUT OF THE ACTIVITIES OF FORCES IN THE TERRITORY OF A NATO COUNTRY. WITHOUT SUCH A LIMITATION THE WAIVER OF CLAIMS IN PARAGRAPH 1 WOULD EXTEND TO THE WORLDWIDE ACTIVITIES OF THE ARMED FORCES OF NATO COUNTRIES EVEN WHEN NOT OPERATING IN THE TERRITORY OF A NATO COUNTRY OR IN ANY WAY CONNECTED WITH NATO.

4. SINCE PARAGRAPH 5 OF ARTICLE VIII PROVIDES THAT THE RECEIVING STATE SHALL SHARE IN THE COST OF SETTLEMENT OF THIRD PARTY CLAIMS ARISING FROM THE PERFORMANCE OF OFFICIAL DUTY, THE USG HAS GREAT DIFFICULTY WITH PROPOSAL TO AGREE IN AN IMPLEMENTING AGREEMENT TO PAY THE FULL AMOUNT OF SUCH CLAIMS. AS INDICATED ABOVE THIS WOULD BE CONTRARY TO THE PROVISIONS OF THE DCA AND NATO SOFA, AND IMPLEMENTING AGREEMENTS SHOULD BE "IN CONFORMITY" WITH THE PROVISIONS OF THESE AGREEMENTS. MOREOVER, IF THE GOT PROPOSAL REPORTED IN REFTEL CONTEMPLATES ADJUDICATION OF
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CLAIMS BY TURKISH AUTHORITIES WITH FULL REIMBURSEMENT BY THE UNITED STATES, SUCH AN ARRANGEMENT WOULD BE CONTRARY TO US LAW. UNDER US LAW, NO PAYMENT OF FUNDS MAY BE MADE FOR CLAIMS AGAINST THE USG UNLESS AUTHORIZED BY EXISTING LAW OR A SPECIAL ACT OF CONGRESS. EXISTING LAW AUTHORIZES ONLY TWO METHODS FOR PAYMENT OF CLAIMS ARISING FROM THE ACTIVITIES OF US FORCES OVERSEAS.

5. ONE AUTHORIZED PROCEDURE IS VIA AN INTERNATIONAL AGREEMENT LIKE NATO SOFA. THE INTERNATIONAL AGREEMENT CLAIMS ACT (IO USC 2734A) AUTHORIZES THE REIMBURSEMENT OF A FOREIGN COUNTRY FOR THE USG'S PRO RATA SHARE OF A CLAIM PROCESSED AND SETTLED BY THE HOST COUNTRY UNDER AN INTERNATIONAL AGREEMENT SUCH AS NATO SOFA. THE REFERENCE IN THIS AUTHORIZING LEGISLATION TO PAYMENT BY THE USG OF ITS "PRO RATA SHARE" OF CLAIMS UNDER AN INTERNATIONAL AGREEMENT WOULD PRECLUDE THE USG FROM ENTERING INTO AN AGREEMENT WHICH REQUIRES THE USG TO REIMBURSE THE HOST COUNTRY FOR THE FULL COST OF CLAIMS ADJUDICATED BY THE LATTER. LEGISLATIVE HISTORY INDICATES CONGRESS INTENDS THIS MEANING OF "PRO-RATA" AND THAT PAYMENT OF 100 PERCENT OF AWARDS DETERMINED BY FOREIGN AUTHORITIES IS NOT

ALLOWED BY THE STATUTE AND NOT ACCEPTABLE TO THE US

CONGRESS.

6. THE OTHER METHOD AUTHORIZED BY US LAW FOR PAYMENT OF CLAIMS ARISING FROM THE ACTIVITIES OF US FORCES OVERSEAS IS THE FOREIGN CLAIMS ACT (10 USC 2734). UNDER THIS LAW, CLAIMS ARE ADJUDICATED AND PAID BY US CLAIMS COMMISSIONS COMPOSED OF ONE OR MORE COMMISSIONED OFFICERS OF THE US ARMED FORCES. THE US RELIES ON THIS STATUTE FOR SETTLEMENT OF DUTY CLAIMS IN THOSE COUNTRIES WHERE WE DO NOT HAVE AN AGREEMENT SUCH AS NATO SOFA PROVIDING FOR THE SETTLEMENT OF SUCH CLAIMS BY THE HOST GOVERNMENT ON A COSTSHARING BASIS, AND FOR SETTLEMENT OF NON-DUTY, EX GRATIA CLAIMS IN ANY FOREIGN COUNTRY. FYI: FOREIGN CLAIMS ACT HAS ON RARE OCCASION BEEN USED FOR CERTAIN DUTY CLAIMS IN COUNTRIES WHERE NATO SOFA CLAIMS FORMULA APPLIES, BUT USG IS NOT PREPARED TO MAKE AN ADVANCE COMMITMENT TO THE TURKS TO DO SO IN ALL SECRET

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AIRCRAFT CASES. TURKISH DIFFICULTIES COULD BE CONSIDERED ON AN AD HOC BASIS IN CONTEXT OF PARTICULAR TROUBLESOME CLAIM. END FYI.

7. IT IS NOT GENERALLY THOUGHT THAT CLAIMS PROVISIONS OF NATO SOFA ARE OBSOLETE OR OUT OF DATE. THE ADJUDICATION BY THE RECEIVING STATE OF CLAIMS AGAINST THE SENDING STATE WAS HIGHLY INNOVATIVE SOLUTION, WHICH HAD THE ADVANTAGE FOR THE RECEIVING STATE THAT ITS CITIZENS WOULD HAVE THEIR CLAIMS ADJUDICATED ACCORDING TO THEIR OWN STANDARDS OF LIABILITY AND DAMAGES, AND NOT FOREIGN STANDARDS, AND BY LOCAL GOVERNMENT ADJUDICATORS WHOSE GOOD WILL CANNOT BE SUSPECTED BECAUSE THEY ARE FOREIGN. MOREOVER, IT HAD ADVANTAGE FOR SENDING STATE IN AVOIDING TROUBLESOME LEGAL AND PUBLIC RELATIONS CONSEQUENCES OF ATTEMPTING TO ADJUDICATE AND SETTLE CLAIMS TO THE SATISFACTION OF PERSONS OF DIFFERENT CULTURAL BACKGROUND WITH DIFFERENT LEGAL STANDARDS. THE COST SHARING PROVISIONS ARE NECESSARY TO MAKE THE AGREEMENT ACCEPTABLE TO THE SENDING STATES. NO GOVERNMENT IS PREPARED TO AGREE IN ADVANCE THAT OFFICIALS OF ANOTHER GOVERNMENT CAN OBLIGATE ITS FUNDS FOR THE PAYMENT OF CLAIMS, UNLESS THERE ARE SAFEGUARDS BUILT INTO THE PROCEDURES. THE COST SHARING ARRANGEMENT IS AN IMPORTANT SAFEGUARD. THE CLAIMS PROVISIONS OF NATO SOFA HAVE BEEN

REGARDED AS PARTICULARLY USEFUL DEVELOPMENT IN INTERNATIONAL LAW, AND IT HAS BEEN NOTED THAT OVER LONG PERIOD OF TIME THESE PROVISIONS HAVE CONTINUED TO MEET NEEDS OF BOTH SENDING AND RECEIVING STATES. INDEED, 20 YEARS EXPERIENCE WITHIN NATO CONFIRMS VALIDITY OF CONCEPT EMBODIED IN ARTICLE VIII.

8. WE AGREE WITH POSITION TAKEN BY EMBASSY THAT HARDSHIP PROVISIONS OF PARA 5(F) OF ARTICLE VIII ARE ADEQUATE TO PROTECT TURKISH INTERESTS IN THE EVENT OF LARGE CLAIMS ARISING FROM US AIRCRAFT OPERATIONS. MOREOVER, IF IN FACT NATO INTERESTS ARE NOT MUCH INVOLVED IN PARTICULAR CASE REGARDED AS CAUSING GOT HARDSHIP, REPRESENTATIONS MADE ON A BILATERAL BASIS WOULD BE FULLY CONSIDERED BY
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USG.

9. IN SUMMARY, IN VIEW NEED FOR CONSISTENCY WITHIN NATO, AND LEGAL CONSIDERATIONS, INCLUDING FACT OF EXISTING AGREEMENTS IN DCA AND NATO ARTICLE VIII, USG NOT WILLING TO CONSIDER TURKISH PROPOSAL FOR ADVANCE COMMITMENT TO REGARD PARTICULAR CLASSES OF CASES AS FALLING OUTSIDE PURVIEW OF NATO CLAIMS PROCEDURES. ANY PARTICULAR ACCIDENT OR EVENT HAVING OVERRIDING FINANCIAL OR POLITICAL CONSEQUENCES FOR USG AND GOT COULD OF COURSE BE MADE THE SUBJECT OF DISCUSSIONS WHICH WOULD BE BASED ON THE ACTUAL HARDSHIPS AND OTHER CONSIDERATIONS IMPOSSIBLE TO FORESEE.
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